

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-001502-WC

DRAYER PHYSICAL THERAPY

APPELLANT/CROSS-APPELLEE

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-10-00616

KRISTIN REESE; HON. CHRIS
DAVIS, ADMINISTRATIVE LAW
JUDGE; AND WORKERS'
COMPENSATION BOARD

APPELLEES/CROSS-APPELLANTS

AND

NO. 2011-CA-001634-WC

KRISTIN REESE

APPELLANT/CROSS-APPELLEE

v.

CROSS-PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-10-00616

DRAYER PHYSICAL THERAPY;
HON. CHRIS DAVIS, ADMINISTRATIVE
LAW JUDGE; AND WORKERS'
COMPENSATION BOARD

APPELLEES/CROSS-APPELLANTS

OPINION
AFFIRMING

** ** *

BEFORE: CLAYTON, MAZE AND TAYLOR, JUDGES.

MAZE, JUDGE: On February 18, 2011, Administrative Law Judge (ALJ) Chris Davis dismissed Kristin Reese's application for workers' compensation benefits and medical expenses, finding that Reese had failed to provide timely notice of the injury to her employer, Drayer Physical Therapy (Drayer). The ALJ further found that Reese failed to prove she suffered a permanent work-related disability as a result of cumulative trauma suffered while she was employed by Drayer. On review, the Workers' Compensation Board (Board) affirmed in part, reversed in part and remanded the claim to the ALJ for additional findings on the merits of Reese's claim. In its petition for review, Drayer argues that the Board erred by finding that Reese had given timely notice of the manifestation of her cumulative trauma, and by remanding for additional findings on whether Reese suffered a temporary work-related injury. In her cross-petition for review, Reese argues that the ALJ erred by relying on the opinion of the independent medical evaluator in determining that she did not suffer a permanent work-related impairment. Finding no error on any of these grounds, we affirm the Board.

The relevant facts of this matter are as follows: Reese began working as a physical therapist for Drayer in October 2006. Reese testified that in November 2008, sometime before Thanksgiving, she began experiencing pain in

her left scapular area while doing extension mobilizations on patients. She stated that her symptoms progressively worsened over the course of the next two weeks, spreading to her neck. Over the next several months, she began to experience constant headaches and pain “going down” her left arm. She denied that her symptoms arose as a result of a single work-related event, but came on gradually as a result of performing extension mobilizations on patients.

Reese did not immediately inform her employer about the symptoms. She testified that she discussed it with a co-worker, Kathryn Hunt, sometime “before Christmas” in December 2008. She also told Hunt that she believed her work activity was the cause of her symptoms. In January 2009, Reese provided the same information to Jeffry Wills, the center manager. However, Wills did not recall Reese stating that she believed her symptoms to be work related.

Reese testified that she self-treated her symptoms at work throughout 2009 using ice and heat and performing self-massage and self-immobilization. Other physical therapists at the clinic assisted her during this period, including Hunt and Wills. However, her symptoms continued to worsen and she was subject to “flare-ups” of pain. On December 14, 2009, Reese completed an “Incident Report” which described her symptoms and stating that they began in November of 2008. Following another flare-up in her condition during January 2010, Hunt referred Reese for outside medical treatment.

In February, 2010, Reese submitted applications for short-term and long-term disability benefits through Drayer. During this period, she also

consulted with Dr. Charles Johnson, D.O., for treatment. After an initial consultation on January 8, 2010, Dr. Johnson diagnosed her with cervical radiculopathy radiating into the left shoulder and arm and took her off work. Thereafter, Dr. Johnson referred Reese to Dr. Dennis Whaley for an MRI scan. Dr. Whaley interpreted the thoracic MRI scan as showing “no significant abnormality,” but the cervical scan revealed evidence of “slight kyphosis at C3-4 and again at C6-7 with straightening of the cervical spine between these levels.” Electromyography/nerve conduction studies were subsequently performed on February 8, 2010, by Dr. Patrick K. Leung. Those tests were interpreted as revealing evidence of mild chronic left C5 and C6 radiculopathies, as well as mild median neuropathies involving both wrists. Reese also continued physical therapy at Drayer through May 25, 2010.

Also in February, 2010, Drayer’s workers’ compensation carrier presented Dr. Johnson’s medical records for peer review to Dr. Brian McCrary, D.O., with UniMed Direct in Plano, Texas. Dr. McCrary noted Reese had only seen Dr. Johnson “on a couple of occasions,” and the records presented were “handwritten and hard to read.” Dr. McCrary further noted he was not provided x-rays and other diagnostic testing. Dr. McCrary stated it was “possible” Reese “suffered an acute soft tissue strain to the neck and upper back on 11/1/08.” Dr. McCrary felt if that were the case, “a soft tissue injury such as this would have resolved without permanent sequela within a few weeks.” Dr. McCrary stated it was also possible Reese had “early osteoporosis or degeneration at the upper

thoracic spine which has not been consistent with, or reported as, due to any occupational injury that could have caused permanent injury to the thoracic spine.” Dr. McCrary stated he was uncertain as to Reese’s actual diagnosis, but felt “any radiculopathy at the cervical or thoracic spine, and any bony injury or degenerative changes at the cervical or thoracic spine are not consistent with the reported mechanism of injury and would be more likely than not due to unrelated or pre-existing medical process.”

On February 26, 2010, at Dr. Johnson’s request, Reese was seen for consultation by Dr. Alexis Norelle, who recommended epidural steroid injections. On March 3, 2010, on referral from Dr. Norelle, Reese came under the care of Dr. Daniel Keck at the Lexington Clinic Pain Management Section. Between March 15, 2010, and April 19, 2010, Dr. Keck performed a series of three cervical epidural steroid injections. In addition, on May 4, 2010, Dr. Keck performed cervicothoracic trigger point injections due to Reese’s ongoing complaints of pain. Reese subsequently underwent additional physical therapy at Dr. Keck’s direction administered by Kort Physical Therapy from May 26, 2010, through September 9, 2010.

Reese began treating with Dr. Jonathan Cole, Ph.D., a licensed clinical psychologist, on May 27, 2010. On September 27, 2010, she was referred for psychiatric evaluation by Dr. Cole to Beaumont Behavioral Health, PSC, where she was diagnosed with adjustment disorder, depression and anxiety. Reese subsequently was treated with medication and psychotherapy.

On May 25, 2010, Reese filed an application for workers' compensation benefits with the Department of Workers' Claims. She alleged work-related cumulative trauma involving her cervical spine with radicular symptoms involving the left scapula, left arm and left hand. In the application, Reese identified November 24, 2008, as the date her work-related disability became manifest. Reese was later permitted by the ALJ to amend her application for benefits to include a claim for psychological overlay secondary to her physical complaints. Reese testified she was terminated by Drayer on May 27, 2010, due to medical restrictions imposed by Dr. Johnson.

On September 21, 2010, Reese underwent an independent medical evaluation ("IME") performed by Dr. Frank A. Burke, an orthopedic surgeon. Following a review of medical records and a physical examination, Dr. Burke diagnosed Reese as having a "cervical injury as a result of her work as a physical therapist, which started in the fall of 2008." Dr. Burke identified Reese's condition as cervicalgia with left C5 and left C6 radiculopathies, along with symptomology and electrodiagnostic studies consistent with a bilateral carpal tunnel syndrome. Dr. Burke felt Reese was not a surgical candidate based on the studies previously performed. He recommended further evaluation, however, consisting of a "cervical myelogram CT scan" and additional "EMG nerve study." Pursuant to the American Medical Association Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides"), Dr. Burke assessed Reese as DRE Category 3, which translates to a 15 percent whole person impairment rating. Based on Reese's

restrictions, Dr. Burke felt “cross training into hand therapy or possible occupational therapy should be a consideration.”

Reese subsequently underwent an IME performed by Dr. Timothy Kriss, a neurosurgeon, on November 15, 2010. Following a review of medical records and a physical examination, Dr. Kriss diagnosed Reese as having suffered a musculoskeletal strain of the left posterior muscles, left trapezis muscle, and left upper thoracic paraspinous muscles. Dr. Kriss stated: “This is consistent with the location of her complaints, the mechanism of injury, and the aggravation of symptoms with movement or physical activity.

Dr. Kriss felt Reese also exhibited “fairly impressive symptom magnification.” In addition, Dr. Kriss found no evidence that Reese’s condition was work related or that she suffered from any current impairment. Rather, he concluded that if Reese had suffered any injury, she would have reached maximum medical improvement (“MMI”) no later than March 24, 2010. Consequently, Dr. Kriss assessed a 0 percent whole person impairment rating under the AMA Guides. Dr. Kriss further found no permanent work-related harmful change and no need for any permanent work-related physical restrictions.

Dr. Dennis B. Sprague, Ph.D., a licensed clinical psychologist, Dr. Robert P. Granacher, Jr., a forensic psychiatrist, each performed independent psychiatric evaluations of Reese in late 2010. Dr. Sprague diagnosed Reese with a “Mood Disorder NOS” and “Pain Disorder with Psychological Factors and General Medical Condition.” Dr. Sprague stated within reasonable medical/psychological

probability, Reese's "pain symptoms created mood changes and symptoms of chronic pain" and, consequently, her psychological complaints were a direct result of her work-related physical injury at Drayer. Dr. Granacher diagnosed Reese with "mood disorder (major depression), mostly in remission at the present time." Both Dr. Sprague and Dr. Granacher assessed Reese as having a 10 percent whole person psychological impairment. Neither further found any evidence of psychological impairment which pre-existed Reese's injury at Drayer.

After reviewing the evidence, the ALJ dismissed the claim, concluding that Reese had failed to give timely notice of her injury. The ALJ found that Reese was trained and employed as a physical therapist, and thus was qualified to identify her injury and the fact that it was work related. The ALJ also found that Reese knew of her injury no later than January of 2009, but continued to perform the same duties for Drayer for another 11 months without giving notice or seeking formal treatment.

Although the ALJ dismissed Reese's claim based on her failure to give timely notice of the injury, the ALJ went on to address other aspects of the evidence. The ALJ was not convinced that Reese had proven she suffered a work-related injury, either due to cumulative trauma or a specific incident. The ALJ pointed out that Reese could not identify a specific date of onset for her symptoms. Furthermore, the ALJ accepted Dr. Kriss's opinion that any injury which Reese sustained in November 2008 would have reached MMI no later than March 24, 2010. Finally, the ALJ also accepted Dr. Kriss's testimony that there was no

evidence of any connection between Reese's current symptoms and any work-related injury which she sustained in November of 2008. Consequently, the ALJ concluded that Reese's claim for benefits and medical expenses must also fail on the merits.

On appeal, the Board reversed on the issue of sufficiency of notice. The Board found that a physical therapist does not qualify as a physician within the meaning of the Workers' Compensation Act. As a result, the Board concluded that she was not qualified to make diagnoses or by extension to render opinions concerning medical causation. Hence, the Board concluded that Reese could not be expected to self-diagnose the cause of her problem. The Board further found as a matter of fact that Reese gave timely notice on December 14, 2009.

Turning to the factual issues, the Board found that the ALJ properly relied on Dr. Kriss's opinion that Reese did not suffer a permanent work-related physical injury. However, the Board stated that the ALJ failed to make a specific finding whether Reese had sustained a temporary gradual physical injury due to her work activities as a physical therapist at Drayer. As a result, the Board remanded for additional findings on this question. The Board also remanded the matter to a make a permanent disability award for her secondary psychological claim if the ALJ found that the underlying physical injury was work related. Board Member Stivers dissented from this portion of the Board's opinion, concluding that the medical evidence compelled an award of income benefits for a temporary

work-related physical injury and a permanent psychological injury. This petition and cross-petition for review followed.

When reviewing a decision of the Board, we will affirm the Board absent a finding that the Board has misconstrued or overlooked controlling law or has so flagrantly erred in evaluating the evidence that gross injustice has occurred. *Western Baptist Hospital v. Kelly*, 827 S.W.2d 685 (Ky. 1992). In its petition for review, Drayer argues that the Board erred by reversing the ALJ's finding that Reese failed to provide due and timely notice of her injury. Kentucky Revised Statutes (KRS) 342.185 mandates that compensation shall not be available unless the injured employee provides notice "as soon as practicable" after the accident causing the injury. In the case of a gradual injury or cumulative trauma, the employee's obligation to give notice arises upon manifestation of the disability; that is, the date on which the employee first learns that she has sustained a gradual injury and that it is work related. *Hill v. Sextet Mining Corp.*, 65 S.W.3d 503, 507 (Ky. 2001), and *Alcan Foil Products v. Huff*, 2 S.W.3d 96, 101 (Ky. 1999). Since medical causation is a matter for expert opinion, a claimant is generally not required to give notice until a physician diagnoses a gradual, work-related injury. *Hill*, 65 S.W.3d at 507.

The ALJ found that Reese, as a trained physical therapist, was qualified to make these determinations without consulting a physician. But, as the Board noted, a physical therapist does not fall within the definition of the term "physician" set out in KRS 342.0011(32). Consequently, Reese's obligation to

provide notice of the injury was not triggered until February 11, 2010, when Dr. Johnson expressly informed her that her symptoms were caused by her work activities. An employee is not prohibited from giving notice of a gradual injury at an earlier date if she suspects her condition is work related. *American Printing House for the Blind v. Brown*, 142 S.W.3d 145 (Ky. 2004). In this case, Reese gave such notice by filing the Incident Report on December 14, 2009, and that date must be regarded as the manifestation of her disability. Therefore, the ALJ erred as a matter of law in finding that Reese was qualified to self-diagnose her condition and that she was obligated to give notice of her injury to Drayer before she was formally diagnosed by a physician.

The parties next address the issues relating to the ALJ's decision on the merits of the case. In her cross-petition, Reese argues that Dr. Kriss's opinion did not constitute substantial evidence because his opinion was based on a clearly erroneous review of the medical records. As a result, Reese contends that the ALJ clearly erred by accepting his determination that she suffered no permanent work-related injury.

On factual questions, Reese, as the claimant, had the burden of proof. Since she was unsuccessful before the ALJ, the issue on appeal is whether the evidence compels a different conclusion. *Wolf Creek Collieries v. Crum*, 673 S.W.2d 735 (Ky. App. 1984). Compelling evidence is defined as evidence that is so overwhelming no reasonable person could arrive at the same conclusion reached by the ALJ. *REO Mechanical v. Barnes*, 691 S.W.2d 224 (Ky. App. 1985).

As fact-finder, the ALJ has the sole authority to determine the quality, character and substance of the evidence. *Square D Co. v. Tipton*, 862 S.W.2d 308 (Ky. 1993). Similarly, it is within the ALJ's discretion alone to judge the weight to be afforded to and inferences to be drawn from the evidence. *Miller v. East Kentucky Beverage/Pepsico, Inc.*, 951 S.W.2d 329 (Ky. 1997); *Luttrell v. Cardinal Aluminum Co.*, 909 S.W.2d 334 (Ky. App. 1995). The ALJ may choose to accept or reject any testimony, or to believe or disbelieve any part of the evidence, regardless of whether it hearkens from the same witness or the same adversary party's total proof. *Magic Coal v. Fox*, 19 S.W.3d 88, 96 (Ky. 2000).

Thus, on appeal, mere evidence to the contrary of the ALJ's decision is not sufficient to require a reversal. *Id.* Rather, in order to reverse the decision of the ALJ below, it must be shown there was no substantial evidence of probative value to support his decision. *Special Fund v. Francis*, 708 S.W.2d 641, 643 (Ky. 1986). Substantial evidence is defined to mean evidence of relevant consequence which would induce conviction in the minds of reasonable people. *Smyzer v. B.F. Goodrich Chemical Co.*, 474 S.W.2d 367, 369 (Ky. 1971).

Reese argues that Dr. Kriss's opinion was based on an inaccurate history and therefore the ALJ improperly relied on his conclusion that she suffered no permanent work-related injury. We agree with the Board that the ALJ was well within his role as fact-finder by relying on the opinions of Dr. Kriss. Dr. Kriss conducted the IME pursuant to KRS 342.315. Under the statute, the ALJ must afford presumptive weight to the findings and conclusions of the evaluator

unless rebutted by the opponent of the evidence. KRS 342.315(2). While Reese takes issue with Dr. Kriss's interpretation of the medical evidence and records, she does not show that Dr. Kriss's opinions are so fundamentally flawed as to be inherently unreliable. The Board concluded that Dr. Kriss's testimony concerning the duration of Reese's physical injury constituted substantial evidence upon which the ALJ was free to rely. We cannot find that the Board's assessment of this evidence was so flagrant as to cause gross injustice. *Western Baptist Hosp. v. Kelly*, 827 S.W.2d at 688 (Ky. 1992).

Finally, Drayer argues in its direct petition that the Board erred by remanding the matter for additional findings on the issue of whether Reese suffered a temporary injury. Since the ALJ unequivocally accepted Dr. Kriss's opinion that Reese did not suffer a work-related injury, Drayer maintains that the Board improperly substituted its judgment for the ALJ on the sufficiency of Dr. Kriss's opinion. Along similar lines, Drayer maintains that the ALJ's finding on causation would also preclude her claim for psychological disability.

Drayer points out that the ALJ expressed strong doubts that Reese had sustained any type of work-related injury, whether temporary or permanent. But, as the Board noted, the ALJ only addressed whether Reese suffered from a permanent disability from her cumulative trauma. Furthermore, the medical evidence does not support the ALJ's suggestion that Reese did not suffer any work-related injury. Even Dr. Kriss diagnosed Reese with a "work-related musculoskeletal strain," which in his opinion would have resolved by March 24,

2010, but never subjectively improved because of ongoing psychological factors. Dr. McCrary reached a similar conclusion, although he could not definitively say whether the condition was work related. Drs. Johnson and Burke were both clearly of the opinion that Reese's physical symptoms were causally related to her work activities as a physical therapist.

While the uncontested evidence supports a finding that Reese sustained at least a temporary disability arising from work-related cumulative trauma, the Board correctly recognized that it is not vested with fact-finding authority. KRS 342.285(2). Consequently, the Board properly remanded the matter for additional findings. Moreover, the Board did not specifically direct the ALJ to make any particular finding, but only to make a determination whether Reese sustained a work-related cumulative trauma producing temporary physical injury, and to recite with specificity his reasons for so ruling. The Board also correctly added that, if the ALJ finds a temporary work-related physical injury, Reese will be entitled as a matter of law to a permanent disability award for her secondary psychological claim. *Richard E. Jacobs Group, Inc. v. White*, 202 S.W.3d 24 (Ky. 2006); and *Lexington-Fayette Urban County Government v. West*, 52 S.W.3d 564 (Ky. 2001). Under these circumstances, we cannot find that the Board misconstrued or overlooked controlling law or has flagrantly erred in evaluating the evidence.

Accordingly, the July 19, 2011, opinion of the Workers' Compensation Board is affirmed.

ALL CONCUR

BRIEF FOR APPELLANT/CROSS
APPELLEE DRAYER PHYSICAL
THERAPY:

Kamp T. Purdy
Tonya Clemons
Lexington, Kentucky

BRIEFS FOR APPELLEE/CROSS-
APPELLANT KRISTIN REESE:

Charles W. Gorham
Lexington, Kentucky